87-824

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. RICE, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Was petitioner denied due process of law when the trial judge improperly relied on a fact not in evidence in sentencing petitioner to life imprisonment?

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No.

JAMES H. RICE, JR., PETITIONER.

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UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

James H. Rice, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 23, 1987.

OPINIONS BELOW

The initial, unreported, decision of the United States Air Force Court of Military Review remanding the case was rendered on February 4, 1983, and is reproduced in the appendix to this petition ("Pet. App.") at page 28a. *United States v. Rice,* ACM 23506, slip op. (A.F.C.M.R. 1983). The court's final decision is reported at 20 M.J. 764 (A.F.C.M.R. 1985), Pet. App. 16a. The decision of the United States Court of Military Appeals is reported at 25 M.J. 35 (C.M.A. 1987), Pet. App. 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. III 1985) and 10 U.S.C. § 867(h) (Supp. III 1985). The judgment of the United States Court of Military Appeals was entered on September 23, 1987.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

MANUAL FOR COURTS-MARTIAL PROVISION INVOLVED

Rule 606 of the Military Rules of Evidence, *Manual for Courts-Martial, United States, 1969 (Revised edition)* ("M.C.M., 1969 (Rev.))", Exec. Order No. 11476, provides in pertinent part:

> (b) *Inquiry into validity of findings or sentence.* Upon an inquiry into the validity of findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

Petitioner was tried by a general court-martial, military judge alone, in February, 1982, at Randolph Air Force Base, Texas. Pursuant to his pleas, he was found guilty of

unpremeditated murder and aggravated assault. The court sentenced him to life imprisonment, dismissal from the service, and total forfeiture of pay.

In the course of plea negotiations with the general court-martial convening authority, petitioner's two civilian and single military defense counsel met with the military judge in a pretrial conference. This conference was also attended by members of the prosecution. Petitioner was absent. As a result of statements made by the judge during this session concerning his sentencing philosophy, petitioner elected to conclude a plea bargain with the convening authority and request trial by judge alone. Thereupon, he entered pleas of guilty to unpremeditated murder of another Air Force lieutenant and aggravated assault upon a security policeman. The plea agreement made no reference to any limitations on the potential sentence which included a maximum term of life imprisonment.

About three months after the trial and on appeal, petitioner claimed that in a pretrial conference the judge promised not to sentence him to more than 30 years confinement. The first appellate court, the United States Air Force Court of Military Review (Court of Review), remanded the case for a limited hearing on the providency of petitioner's pleas as a result of his claim. *United States v. Rice,* ACM 23506, slip op. (A.F.C.M.R. February 4, 1983). During the hearing, the trial judge testified regarding the pretrial conference. He said that an unresolved factor in his mind relevant to determining an appropriate sentence was whether the victim's hands were tied behind his back at the time of death. He stated further that the evidence presented at trial disclosed the victim's hands were, in fact, so tied. The implication flowing from these remarks was that this fact justified the sentence to life imprisonment.

Petitioner then claimed that the judge's testimony raised a new issue, because the evidence in the record of trial did

not support the judge's recollection. Upon reviewing the record of the limited hearing, the Court of Review, relying on Military Rule of Evidence 606(b),[1] M.C.M., 1969 (Rev.), and citing *Washington v. Strickland,* 673 F.2d 879, 693 F.2d 1243 (5th Cir. 1982) (en banc), *rev'd on other grounds,* 466 U.S. 668 (1984), found the judge's testimony "inadmissible for the purpose of impeaching his sentence." *Rice,* 20 M.J. at 769. The court did not address whether the evidence admitted at trial comported with the trial judge's recollection.

While agreeing with the lower court, the Court of Military Appeals did examine the record of trial and determined that the fact of the victim's hands being tied could be reasonably inferred from a stipulation of fact (Pros. Ex. 49) and was not necessarily inconsistent with petitioner's responses during the providency inquiry. *Rice,* 25 M.J. at 38. Petitioner submits that the Court of Military Appeals erred by concluding that the inference was reasonable and ruling that the judge's testimony at the post-trial hearing cannot be used to impeach the sentence he adjudged.

REASONS FOR GRANTING THE WRIT

Petitioner maintains that the trial judge relied on a conclusion of fact not found in the evidence to determine a sentence. In so doing, the judge denied petitioner due process of law. *See Chambers v. Mississippi,* 410 U.S. 284 (1973); *United States ex rel. Owen v. McMann,* 435 F.2d 813, 817-818 (2d Cir. 1970), *cert. denied,* 402 U.S. 906 (1972). The fact in issue, if petitioner's claim is accepted, is in the nature of extraneous material. Improper introduction of extraneous material into jury deliberations is an exceptional basis for impeachment evidence. Mil. R. Evid. 606(b). Extraneous material is "information, whether

[1] Mil. R. Evid. 606(b) incorporated Fed. R. Evid. 606(b).

documentary or oral in nature, introduced into the jury room but not put before [the jurors] at trial." *Downey v. Peyton,* 451 F.2d 236, 239 (4th Cir. 1971). Although inquiry may not be had into how extraneous material or influences operated upon a deliberator's mind, either testimonial or affidavit evidence is admissible to prove the *existence* of such material or influence. *United States v. Gutman,* 725 F.2d 417, 422 (7th Cir. 1984), *cert. denied,* 469 U.S. 880 (1984); *Llewellyn v. Stynchcombe,* 609 F.2d 194, 196 (5th Cir. 1980). The reviewing court shall rebuttably assume prejudice and the burden is on the government to demonstrate the harmlessness of the intruding extraneous material. *United States v. Howard,* 506 F.2d 865, 868 (5th Cir. 1975).

The sentencing process, not simply the verdict itself, must satisfy due process requirements. *Gardner v. Florida,* 430 U.S. 349, 358 (1977). Petitioner's case imparts a unique insight into a judge's sentencing inclinations and records a rare instance of factual error relied upon by that judge. Admittedly, these circumstances may not happen again soon, however, where a sentence is so severe and the error is so great, further denial of due process cannot be called justice.

CONCLUSION

Petitioner submits that he has suffered a denial of due process of law. Therefore, his petition for a writ of certiorari should be granted.

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NOVEMBER 1987

APPENDICES

APPENDIX

UNITED STATES, APPELLEE

v.

JAMES H. RICE, JR., SECOND LIEUTENANT
U.S. AIR FORCE

No. 52,924

ACM 23506

United States Court of Military Appeals
September 23, 1987

COUNSEL

For Appellant: *Jay D. Terry, Esq.* (argued); *Captain Timothy J. Malloy* (on brief); *Colonel Leo L. Sergi* and *Major Alexander S. Nicholas.*

For Appellee: *Lieutenant Colonel Robert E. Giovagnoni* (argued); *Colonel Joe R. Lamport* and *Major Joseph S. Kistler* (on brief); *Colonel Kenneth R. Rengert* and *Major Robert E. Ferencik, Jr.*

OPINION OF THE COURT

SULLIVAN, *Judge*:

During February 1982 appellant was tried by general court-martial, military judge sitting alone, at Randolph Air Force Base, Texas. Pursuant to his pleas, he was found guilty of unpremeditated murder and aggravated assault, in violation of Articles 118(2) and 128(b)(1), Uniform Code of Military Justice, 10 U.S.C. §§ 918(2) and 928(b)(1), respectively. He was sentenced to dismissal,

confinement for life, and total forfeitures. The convening authority approved, and the Court of Military Review affirmed, the findings and sentence. 20 M.J. 764 (1985).

This Court granted review of the following specified issues:

I

WHETHER THE MILITARY JUDGE'S TESTIMONY AT A POST-TRIAL HEARING MAY BE USED TO IMPEACH THE SENTENCE HE HAD PREVIOUSLY IMPOSED IN THIS CASE.

II

WHETHER DEFENSE COUNSEL'S ALLEGED MISUNDERSTANDING OF THE MILITARY JUDGE'S COMMENTS AT THE UNRECORDED PRETRIAL CONFERENCE AFFECTED THE ACCUSED'S DECISION TO SEEK TRIAL BY MILITARY JUDGE ALONE.

III

WHETHER DEFENSE COUNSEL'S ALLEGED MISUNDERSTANDING OF THE MILITARY JUDGE'S COMMENTS AT THE UNRECORDED PRETRIAL CONFERENCE AFFECTED HIS THEN INCHOATE ORAL PRETRIAL AGREEMENT NEGOTIATIONS WITH THE CONVENING AUTHORITY.

We hold that none of the specified exceptions found in Mil. R. Evid. 606(b), Manual for Courts-Martial, United States, 1969 (Revised edition), permit use of this judge's post-trial testimony to impeach his adjudged sentence. Moreover, we conclude that no promise was made by the military judge, and one could not be reasonably perceived, that appellant would not be sentenced to life in prison. Finally, we hold that defense counsel is estopped from asserting any prejudice in his dealings with the convening authority resulting from the irregular, defense-initiated, pretrial conference with the military judge.

A complete rendition of the facts of this case are reported in the opinion below. *United States v. Rice, supra* at 765-67. It suffices to note that on July 6, 1981, appellant murdered a fellow officer by strangulation. This officer's death followed an altercation resulting from a perceived insult to the State of Texas and the deceased's "flipping him the finger." During an aborted escape attempt appellant also shot at one of the Security Policemen who had blocked his escape path. Appellant was persuaded to surrender to the authorities approximately 2 to 3 hours after the police confrontation began.

Appellant was initially charged with premeditated murder and assault with a deadly weapon, with the former charge being referred as capital. Trial began on February 2, 1982, when he was arraigned, several motions were litigated, and *voir dire* of several proposed members occurred. On February 4, this case was continued until February 10 due to "a death in the military judge's family." During this time appellant and his counsel concluded a pretrial agreement with the convening authority in which appellant would plead guilty to unpremeditated murder in a non-capital case in exchange for dropping the premeditated-murder charge. The convening authority accepted this agreement with the provision that the military judge and all counsel be advised of the pending agreement, that appellant concur in the agreement, and that the agreement be "reduced to writing, and signed by all parties." 20 M.J. at 766.

Upon meeting with the military judge, the civilian defense counsel initiated a discussion regarding the judge's disposition concerning life sentences. Defense counsel intimated that civilian judges could and did discuss sentencing during meetings of this type. The military judge participated in the discussion. Furthermore, he stated his general sentencing philosophy regarding a life sentence. However, he clearly indicated to defense counsel that his

decision in this case would await development of the facts presented during trial. The trial resumed shortly after this meeting, and appellant was subsequently sentenced to life imprisonment for the unpremeditated murder of Lieutenant Scherp. On appeal, appellant asserted that the military judge effectively promised to sentence him to a maximum of 30 years' confinement.

This issue was first raised 3 months after trial. The Court of Military Review, on February 4, 1983, remanded the case for a limited post-trial hearing in order to determine if appellant's guilty pleas were improvident due to an unfulfilled sentencing agreement. After this hearing (see appendix) that court ordered a new action. When the case was finally returned to that court, it concluded that the military judge's post-trial testimony could not be used to impeach the sentence adjudged by him and that the military judge made no promises or commitments regarding sentence limitations. *United States v. Rice, supra* at 769.

ISSUE I

Appellant urges this Court to hold that the military judge impermissibly relied on extraneous prejudicial information in sentencing appellant to life imprisonment. *See United States v. Witherspoon,* 16 M.J. 252 (C.M.A. 1983); *United States v. Bishop,* 11 M.J. 7 (C.M.A. 1981). In particular, appellant asserts that the judge admitted in his post-trial testimony that he sentenced appellant to life because he found that the victim's hands were tied at the time of death. Appellant contends that neither the stipulation of fact nor his *Care**-inquiry testimony gives any support for this finding by the military judge. Accordingly, he submits that the judge must have relied on extra-record evidence for this finding, and he asks for a rehearing on sentence.

We first note that the stipulation of fact agreed upon by all parties does expressly say that the victim's hands were tied during the fatal struggle. It states:

> During this time [while appellant was in the victim's room], there was a fight. At some point during the hour, Lieutenant Rice tied Lieutenant Scherp's hands behind his back.
>
> Lieutenant Scherp screamed for help for approximately thirty to sixty seconds. These screams were heard by the person occupying the room directly above Lieutenant Scherp's room, Second Lieutenant Scott E. Miner, at approximately 0330 hours. Lieutenant Miner immediately called the Security Police.
>
> The Accused, at this point, with the intent to inflict grievous bodily harm, placed his arm around Lieutenant Scherp's neck in a choke hold and kept that hold until Lieutenant Scherp died.

This stipulation does not state that the victim's hands had subsequently become untied. Therefore, it is broad enough to support a reasonable inference that the victim's hands were tied at the time the fatal choke hold was applied. *See generally* E. Imwinkelried, P. Giannelli, F. Gilligan, F. Lederer, *Criminal Evidence* 65-67 (1979).

Defense counsel attempts to combine this stipulation with appellant's *Care*-inquiry testimony to establish that the victim's hands were free at the time of the victim's death. However, it only provides an inference that the victim's hands were untied at the time of death. At the *Care* inquiry, the testimony by appellant was as follows:

> ACC: Sir, we were both screaming, yes, sir.
> MJ: Really loud? There was a lot of noise?
> ACC: Yes, sir.
> MJ: What did you do at that point then?
> ACC: Sir, I attempted to leave the room.
> MJ: What caused you to return?

ACC: Sir, a blow to my head.

MJ: What was the source of the blow, do you know?

ACC: *Sir, I determined the source to be a toaster that I had used the cord of which just to tie the deceased with.*

MJ: *So what did you do at that point?*

ACC: *Sir, at that point, I used a stronger method of subduing the deceased.* Further, the struggle continued and, after a while, I put him in a choke hold.

MJ: With your forearm?

ACC: Yes, sir.

MJ: Around the front part of his throat, is that right?

ACC: Yes, sir.

MJ: All right. Did he subsequently go limp?

ACC: Yes, sir, he did.

MJ: Now, to the best of your belief, is Lieutenant Scherp dead?

ACC: Yes, sir, to the best of my knowledge he is dead.

MJ: And, also, to the best of your knowledge, this resulted from this choke hold you put on him in an attempt to subdue during the fight?

ACC: Yes, sir, it is.

MJ: Did you intend at that time to kill him or to inflict serious bodily harm on him when you put the choke hold on him?

ACC: Sir, I did intend to commit serious bodily harm at that time.

(Emphasis added.)

Defense counsel argues that since the victim had thrown the toaster, his hands could not have been bound at that time. Moreover, he asserts that there was no evidence that his hands were subsequently retied. Accordingly, he con-

cludes that the record established that the victim's hands were not tied at the later time of his death. Such an inference is reasonable, but it is not mandatory as a matter of law or common sense. In any event, the military judge was not required to believe the additional facts averred by appellant which were not necessary for acceptance of his pleas. *United States v. Snipes,* 18 M.J. 172, 175 (C.M.A. 1984); *see generally United States v. Chambers,* 12 M.J. 442 (C.M.A. 1982); *United States v. Moglia,* 3 M.J. 216 (C.M.A. 1977). As a trier of fact and sentencing body, the military judge could disbelieve appellant's self-serving testimony and conclude that the victim remained bound. Para. 76*a*(2), Manual, *supra. See Anderson v. City of Bessemer City,* 470 U.S. 564, 573-76, 105 S.Ct. 1504, 1511-13 (1985); *United States v. Williams,* 21 M.J. 360, 362 (C.M.A. 1986).

Assuming the military judge disbelieved this portion of appellant's testimony, an equally reasonable scenario could be drawn from the entire record in this case. Appellant had a number of hours to rearrange the crime scene. The body of the deceased was discovered in bed with blankets partially covering the body from the chest down. The toaster, with its cord still attached, was found under the bed. Under these circumstances, a reasonable inference could be drawn that the victim was bound at the time of death, and appellant untied the victim's hands and placed the body in the bed after being surrounded by the police. Thus, we cannot say that the military judge relied on extraneous prejudicial information in concluding that the victim's hands were tied at the time of his death.

In summary, we conclude that the military judge was not asked and did not testify that extraneous prejudicial information was considered in his deliberations on appellant's sentence. *See* Mil.R.Evid. 606(b). Instead, appellant has belatedly attempted to infer such reliance from the military judge's post-trial testimony on a different

matter. In view of the posture of this record, we find such an appellate tactic is no more than an attempt to accomplish the precise inquiry into the trial judge's mind which is prohibited by Mil.R.Evid. 606. *See Washington v. Strickland,* 693 F.2d 1243, 1263 (5th Cir. 1982) (en banc), *rev'd on other grounds,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Proffitt v. Wainwright,* 685 F.2d 1227, 1255 (11th Cir. 1982), *cert. denied,* 464 U.S. 1002 (1983).

ISSUES II & III

The second granted issue questions the impact of defense counsel's alleged misunderstanding of the military judge's pretrial comments on appellant's decision to seek trial by military judge alone. The third granted issue asks whether this alleged misunderstanding affected his "inchoate" pretrial agreement negotiations with the convening authority. Appellant asserts that the judge's comments which purportedly suggested that no life sentence would be imposed induced him to request trial by judge alone and discontinue his plea bargaining efforts. A similar post-trial claim concerning his decision to plead guilty was rejected as a matter of fact and law by the Court of Military Review. We agree with that court's resolution of that question, which is also applicable to the present claims before this Court.

We particularly note that the comments of the judge were made at an irregular, unrecorded, post-arraignment conference requested by appellant's defense counsel. *United States v. Gray,* 7 M.J. 296 (C.M.A. 1979); *United States v. Priest,* 19 U.S.C.M.A. 446, 42 C.M.R. 48 (1970); *cf.* R.C.M. 802, Manual for Courts-Martial, United States, 1984. In addition, appellant's civilian lawyers were assisted by military defense counsel at this meeting and throughout the entire trial. Presumably, they knew that the convening authority, not the military judge, makes

sentence-limitation agreements. *See United States v. Caruth,* 6 M.J. 184 (C.M.A. 1979). Finally, the military judge's comments at this pretrial conference, as well as his later statements and appellant's statements during the guilty-plea inquiry, and counsel's lack of timely objection at the announcement of sentence make clear that no deal existed or could be reasonably perceived to exist in this case. Any prejudice or detriment suffered by appellant in this context was self-induced and, accordingly, waived.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge COX concur.

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* *United States v. Care,* 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

APPENDIX

FINDINGS

1. The post-trial hearing in the case of *United States v. 2dLt James H. Rice, Jr.*, 455-78-7767, directed by the Air Force Court of Military Review on 4 February 1983 was conducted at Fort Leavenworth, Kansas, on 13-14 April 1983. A verbatim transcript was prepared and is authenticated by me on this date. I reviewed the record of the trial conducted on 2-18 February 1982 and the allied documents accompanying that record including the post-trial review. Also both counsel at the limited hearing submitted summations and they are attached to this record. The submission of Jay Terry, Esq., is Hearing Exhibit 8 and the submission of Major George Cato is Hearing Exhibit 9. All of the above described documents have been considered.

2. Pursuant to the Court of Military Review opinion the following findings of fact are entered:

a. *Timing of significant events:* Negotiations with respect to a pretrial agreement began before 2 February 1982 with a series of offers from Mr. Frank Wright to plead guilty to lesser included offenses of involuntary and voluntary manslaughter made to BG (then Colonel) Rhoten, the convening authority, through the trial counsel, Major Fiore, and the staff judge advocate, Lt Colonel Penater. These offers were totally rejected by BG Rhoten before the trial began on 2 February 1982. The decision of the convening authority was duly relayed to Mr. Wright and the defense team. This series of offers and the rejection of them were not reduced to writing. The trial began on 2 February 1982 with no negotiations pending and the trial was proceeding as a capital case. A session pursuant to Article 39a, U.C.M.J., was in progress on 4 February 1982 when a recess was declared due to the illness (and subsequent death) of the father of the military

judge, Colonel Kenneth Randall. Procedural matters including arraignment and entry of not guilty pleas, several motions of the defense, and *voir dire* of four panel members had been accomplished at the time of the recess. The trial was scheduled to resume on the morning of 10 February 1982 with a continuation of *voir dire* of panel members. On 8 February 1982 during a telephone conversation between Mr. Wright and Major Fiore on other matters, a discussion occurred regarding plea negotiations. Major Fiore considered the discussion to be an offer to plead guilty to unpremeditated murder and aggravated assault in return for the government amending the charges to conform with such pleas. The principal effect would be to make the case non-capital. Major Fiore contacted Lt Colonel Penater and a meeting with the convening authority was set for 9 February 1982. The offer was presented to the convening authority on 9 February 1982 and he stated he would advise them of his decision later in the day after returning from a scheduled flight. The convening authority decided to accept the offer and advised his staff judge advocate of his decision that same day. The SJA informed Major Fiore of the decision also on 9 February shortly after Colonel Randall's return to San Antonio and advised him that plea negotiations were in progress and that there was no need to begin the proceedings early in the morning of 10 February as scheduled. Major Fiore probably informed one of the defense counsel of the convening authority's decision on the 9th also, but if not, did so on the morning of the 10th before the meeting between counsel and the military judge. I find that all counsel and the convening authority understood that any pretrial agreement would have to be concurred in by the accused and thereafter reduced to writing and signed by the parties. Thus the negotiations were contingent in this respect. An agreement as contemplated would enable the accused to submit a request for trial before the military judge alone

and counsel were aware of this effect and comments were made regarding such a possibility. However, such a request was not a term of the negotiations and was understood by all counsel to be a separate matter. Thus at the time of the 10 February meeting between all counsel and the military judge, a pretrial agreement had been negotiated subject to acceptance by the accused to plead guilty to unpremediated murder and aggravated assault and for the government to amend the charges in conformance therewith. The agreement had not been reduced to writing nor signed by any parties nor had a stipulation of fact been signed although a stipulation was in the process of being prepared. The option of the accused to request a bench trial, assuming amendment of charges, was not part of the negotiations, and it was this option that the defense counsel were concerned with in requesting the meeting.

b. *The 10 February meeting:* The meeting was attended by all six counsel [the three military trial counsel, the trial defense counsel, Mr. Wright and Mr. Clancy] and the military judge and lasted about 10 minutes. The first comments were expressions of condolences to the military judge. Mr. Wright then explained that a pretrial agreement was anticipated with the accused pleading guilty to unpremeditated murder and aggravated assault, and the government would then move to amend the charges to conform with the pleas. The procedure involved in accomplishing this was referenced during the explanation. Mr. Wright commented that in civilian cases, it was not uncommon to discuss sentencing with judges and if the military judge was willing to do so, he had some questions. The military judge stated that normally he did not do so but consented to the questioning. Mr. Wright then questioned the military judge. The military judge stated that he did not believe that every murderer should receive a life sentence and that he could think in terms substantially less than a life sentence depending on the extenuation and

mitigation. He knew that there would be psychiatric testimony forthcoming and anticipated other forms of extenuation and mitigation. He also made reference to learning more as to the facts and circumstances of the offense. His comments were specifically directed to the case at hand. The military judge made no promises and made it clear that a sentence imposed by him would depend on the facts and circumstances and the extenuation and mitigation presented. The military judge did make a statement to the effect that "One life has been lost and I see no need to lose another." The exact timing and context of this statement is difficult to fix but I believe it to have been in the context that the proceeding would not be a capital case. It was not intended to be nor could it reasonably have been interpreted as being a statement that he definitely would not give a life sentence in the case at hand. The discussion was then turned by Mr. Wright to what the practical equivalent of a life sentence would be in a fixed term, parole considerations being the standard for comparison. Opinions were expressed by Mr. Wright, Mr. Clancy, and probably others, and it was generally agreed that 30-35 years was a practical equivalent. During this discussion the counsel for the accused made statements that they felt the military procedure in death penalty cases would be found unconstitutional and that the defense did not wish to plead if the accused was going to receive a life sentence in any event. Throughout the meeting, the military judge expressed the position that a sentence adjudged by him would depend on the evidence submitted and specific references were made by him to psychiatric testimony and other extenuation and mitigation he anticipated receiving. He made no commitment, promise or agreement to impose less than a life sentence. The impression or perception of the two civilian defense counsel as set forth in their testimony that the military judge committed himself to less than life imprisonment was not well founded and could

not have been reasonably based on the statements of the military judge.

c. *Trial counsel participation*: All parties had put considerable effort into preparing for the case and were intensely involved. All recognized that the meeting was unusual and that there were hazards, thus comments were guarded and sometimes indirect. The concerns, understandings, and objectives of the participants were different during the meeting. All parties understood that an agreement had been negotiated as to pleas between counsel and the convening authority. The defense counsel had not yet obtained concurrence of the accused and they would shortly be presenting the agreement to him. They were attempting to gather as much information as possible to present to him. All parties recognized that plea bargains are not final until the case was completed, thus all recognized that the agreement could fall out. This was especially true for the military participants who were more acutely aware of the military procedure and requirements as to guilty pleas and pretrial agreements. Defense counsel were concerned with the question of a jury versus bench trial and had not yet made a decision on that matter. The military judge believed there would be a request for trial before judge alone. He wished to assure the defense that he was not "locked into" a life sentence and that a sentence imposed by him would depend on the evidence and matters presented. The trial counsel recognized that the defense was addressing that issue and that the defense had not yet made a decision as to it. They viewed the meeting as unusual and were very concerned with what was said by all parties. Their interests were to be present to keep the meeting from being *ex parte* and to monitor what occurred. Trial counsel made no significant substantive input in the conversation. All three trial personnel were emphatic in their beliefs that the military judge made no commitment as to sentencing and that the maximum imposable

sentence had not been reduced to something less than life imprisonment. At no time during the trial did they believe that there were any deals or understandings outside of the formal agreement and they felt the inquiries of the accused as to the plea and pretrial agreement were adequate and appropriate. I find their beliefs to be reasonable and well-founded. The presentation of the prosecution during the sentencing phase of the trial was aggressive and most vigorous and obviously they were seeking the maximum imposable sentence.

d. *Defense objections first raised*: Mr. Wright and Mr. Clancy testified that they immediately believed the military judge had failed to abide by a commitment when the sentence was announced. There is no evidence that their feelings were made known by them or the accused to the prosecution team, the military judge, Randolph AFB SJA, convening authority or anyone else in a position of authority regarding the trial before the matter was referred to in the *Goode* response. Mr. Wright and Mr. Clancy apparently took no further action regarding the case other than prepare Exhibit 5. They considered themselves to be "on the case" until 23 or 24 February 1982. The hiring of civilian counsel for appellate purposes was contemplated by or on behalf of the accused in March 1982. Negotiations were begun with Mr. Goldstein by at least 9 March and the military defense counsel was informed by Mr. Goldstein that he had been retained on 19 March. A letter from Mr. Goldstein in the post-trial review (p. 33) indicates he was hired on 18 March by the accused's family.

ALLAN C. SMITH, Colonel, USAF
Military Judge

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 23506 (f rev)

UNITED STATES

v.

SECOND LIEUTENANT JAMES H. RICE, JR., 455-78-7767 FR
UNITED STATES AIR FORCE

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20 JUNE 1985

Sentence adjudged 18 February 1982 by GCM convened at Randolph Air Force Base, Texas. Military Judge: Kenneth D. Randall (sitting alone).

Approved sentence: Dismissal, confinement at hard labor for life, and forfeiture of all pay and allowances.

Appellate Counsel for the Accused: Mr. Jay D. Terry, Esq., Dallas, Texas, Colonel George R. Stevens, Major Alexander S. Nicholas and Captain Timothy J. Malloy. Appellate Counsel for the United States: Colonel James P. Porter, Colonel Kenneth R. Rengert, Major George D. Cato, Major Michael J. Hoover, and Major Robert E. Ferencik, Jr.

Before
RAICHLE, CANELLOS and CARPARELLI
Appellate Military Judges

DECISION

RAICHLE, Senior Judge:

The accused was convicted, pursuant to his pleas of guilty, of unpremeditated murder and assault with a dan-

gerous weapon, in violation of Articles 118 and 128, U.C.M.J. The approved sentence extends to dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for life.

I

The facts, as stipulated by the parties, are as follows. Both the accused and the deceased, Lieutenant Scherp, resided in the Bachelor Officer Quarters at Laughlin Air Force Base, Texas. At approximately 0230 hours on 6 July 1981 the accused went to Lieutenant Scherp's room. He was upset with Lieutenant Scherp and wanted to confront him about certain remarks the deceased had made a few days before. When he entered Lieutenant Scherp's room he was carrying a .45 caliber automatic pistol and an ammunition clip. The accused was in Lieutenant Scherp's room approximately one hour during which time a fight occurred. At some point during the hour the accused tied the deceased's hands behind his back. The deceased screamed for help for approximately thirty to sixty seconds. These screams were heard by a neighbor who called the Security Police at about 0330 hours. At some point during the fight, the accused, with the intent to inflict grievous bodily harm, placed his arm around the deceased's neck in a choke hold and kept the hold until the deceased died. Shortly thereafter, two Security Policemen arrived at the door of the deceased's room, knocked on the door and identified themselves. The accused turned off the room light and put a round of ammunition into the pistol. One of the Security Policemen, Staff Sergeant Flowers, took a position near the guardrail on the second floor overlooking the deceased's room. The accused, in an attempt to escape, climbed through the window. He was spotted by Sergeant Flowers who ordered him to halt. The accused fired at Staff Sergeant Flowers with his pistol and retreated back into the room.

At approximately 0500 hours a hostage-negotiation team was dispatched to the BOQ area, headed by Captain David L. Herres. During two conversations over the next hour, the accused telephonically advised Captain Herres that he did have a hostage who was a little hurt but would not require an ambulance. Additional conversations between the accused and Captain Herres ensued until the accused finally indicated he was willing to surrender. At this point, Captain Herres asked the accused about the hostage and was told, "I do not know how he is, but he is not breathing anymore." At approximately 0630 hours the accused surrendered to the Security Police. The deceased was found lying on the bed in his room and a .45 caliber cartridge case was found under the window from which the accused had fired at Sergeant Flowers.

Charges of premeditated murder and assault with a dangerous weapon were preferred, the case was referred as capital, and trial commenced on 2 February 1982. A number of motions were litigated and ruled upon, pleas of not guilty were entered, and *voir dire* of four court members was accomplished. These proceedings lasted through 4 February, at which time the case was continued until 10 February because of a death in the military judge's family. During this interim period, discussions regarding a pretrial plea agreement with the convening authority occurred wherein the accused, through his counsel, orally offered to plead guilty if the government would withdraw the premeditated murder charge and substitute the lesser-included offense of unpremeditated murder. The principal effect would be to make the case non-capital. The convening authority indicated he would accept such an offer and the existence of a pending agreement, although inchoate, was communicated to the military judge and all counsel. However, all counsel and the convening authority understood that any pretrial agreement would have to be

concurred in by the accused, reduced to writing, and signed by all parties. Thus, the negotiations were contingent in this respect. The option of the accused to request a bench trial, assuming amendment of charges, was not part of the negotiations and it was this option with which the defense was concerned in requesting a pretrial meeting in chambers with the military judge. On appeal, the accused alleged that during this unrecorded meeting the military judge agreed that if the accused asked to be tried by military judge alone and pled guilty, he would sentence him to confinement not exceeding 30 years. Because this meeting was off the record, we ordered a limited post-trial hearing be conducted to determine whether the accused's guilty plea was improvident because induced by a subsequently unfulfilled sentencing agreement with the military judge. *United States v. Rice*, ACM 23506 (A.F.C.M.R. 4 February 1983) (unpublished opinion).

Events occurring at that meeting were summarized by the hearing officer as follows:

> The meeting was attended by all six counsel and the military judge and lasted about 10 minutes. The first comments were expressions of condolences to the military judge [regarding the death of his father]. Mr. Wright then explained that a pretrial agreement was anticipated with the accused pleading guilty to unpremediated murder and aggravated assault, and the government would then move to amend the charges to conform with the pleas. The procedure involved in accomplishing this was referenced during the explanation. Mr. Wright commented that in civilian cases, it was not uncommon to discuss sentencing with judges and if the military judge was willing to do so, he had some questions. The military judge stated that normally he did not do so but consented to the questioning. Mr. Wright then questioned the military judge.

The military judge stated that he did not believe that every murderer should receive a life sentence and that he could think in terms substantially less than a life sentence depending on the extenuation and mitigation. He knew that there would be psychiatric testimony forthcoming and anticipated other forms of extenuation and mitigation. He also made reference to learning more as to the facts and circumstances of the offense. His comments were specifically directed to the case at hand. The military judge made no promises and made it clear that a sentence imposed by him would depend on the facts and circumstances and the extenuation and mitigation presented. The military judge did make a statement to the effect that "[O]ne life has been lost and I see no need to lose another." The exact timing and context of this statement is difficult to fix, but I believe it to have been in the context that the proceeding would not be a capital case. It was not intended to be nor could it reasonably have been interpreted as being a statement that he definitely would not give a life sentence in the case at hand. The discussion was then turned by Mr. Wright to what the practical equivalent of a life sentence would be in a fixed term, parole considerations being the standard for comparison. Opinions were expressed by Mr. Wright, Mr. Clancy, and probably others, and it was generally agreed that 30-35 years was a practical equivalent. During this discussion the counsel for the accused made statements that they felt the military procedure in death penalty cases would be found unconstitutional and that the defense did not wish to plead if the accused was going to receive a life sentence in any event. Throughout the meeting, the military judge expressed the position that a sentence adjudged by him would depend on the evidence submitted and specific

references were made by him to psychiatric testimony and other extenuation and mitigation he anticipated receiving. He made no committment, promise or agreement to impose less than a life sentence. The impression or perception of the two civilian defense counsel as set forth in their testimony that the military judge committed himself to less than life imprisonment was not well founded and could not have been reasonably based on the statements of the military judge.

Additionally, the military judge indicated that he had been curious as to whether the evidence would show whether or not the deceased's hands were bound behind his back at the time he was strangled. He further stated that he learned that the hands were bound at the time of death.

The court reconvened shortly after the meeting. Defense counsel advised the military judge that the accused wished to change his plea to guilty of unpremeditated murder and aggravated assault. His plea was accepted, the government moved to amend the specification, striking the words "with premeditation", and findings of guilty were entered. The defense further requested that the trial proceed with the military judge alone. At the conclusion of the sentencing portion of the trial, the military judge pronounced a sentence of dismissal, confinement at hard labor for life, and forfeiture of all pay and allowances.

The accused first asserts that a rehearing on sentence is required because the military judge erroneously believed that the victim's hands were tied at the time of death. We agree that the record of trial contains only limited circumstantial evidence that the victim's hands were tied at the time of death. We decline, however, to review the deliberative processes of the military judge and, therefore, resolve this issue against the appellant.

It is well established in the sphere of jury verdicts that the testimony of a jury member will not be allowed to impeach the validity of the jury's verdict. *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892). As stated in *United States v. D'Angelo*, 598 F.2d 1002 (5th Cir. 1979):

> An attempt to use information extrinsic from the jury's verdict to 'prove its process of deliberation and find out how and why the jury reached its verdict . . . is the one form of attack on a verdict that has always been forbidden in Anglo-American criminal law.'

The reason for the rule was recently summarized as follows:

> The rule represents a compromise . . . [by] according deference to those important policy considerations which commend an inviolate jury process—(a) the protection of jurors against annoyance and harassment by losing parties; (b) the encouragement of free and open discussion among jurors; (c) the reduction of incentive for jury tampering; and (d) the promotion of finality in a jury's verdict.

United States v. Blackston, 547 F. Supp. 1200 at 1217 (D.C.S.D.Ga. 1982).

This general rule was effectively codified in Fed. R. Evid. 606(b) as follows:

> Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was

> improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed.R.Evid. 606(b) was incorporated into Mil.R.Evid. 606(b) with only one significant addition. The military rule added a third exception to include unlawful command influence as an appropriate subject of inquiry. M.C.M 1984, Appendix 22, Analysis of the 1980 Amendments, Rule 606(b), P. 22-37. Thus, in the military this general rule is subject to three exceptions: (1) when extraneous information has been improperly brought to the attention of the court members; (2) when outside influence has been brought to bear on a member; and (3) when unlawful command influence has occurred. *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985); Mil. R. Evid. 606(b).

We believe that the same rule and its rationale apply to verdicts or sentences imposed by judges. Cases in which this issue is discussed are non-existent in military law and, not surprisingly, few and far between in civilian jurisprudence. We have located only a handful. See *Washington v. Strickland*, 673 F.2d 879, 693 F.2d 1243 (5th Cir.1982) (en banc), *rev'd on other grounds*, ____ U.S. ____, 104 S.Ct. ____, 80 L.Ed.2d 674 (1984), and cases cited therein. However, the logic of applying the same rule is irrefutable. As stated by the Fifth Circuit Court of Appeals:

> [T]here are strong policy reasons for prohibiting the use of this sort of testimony. No doubt most judges will remember the capital cases over which they have presided more clearly than cases charging lesser offenses. Yet it is unrealistic to expect that a trial judge can, using nothing more than cold record and his own recollections, completely and accurately reconstruct his thought processes in one particular case that he decided over four years earlier. In addition to these

> mental gymnastics, a judge would have to push aside his natural human tendencies to justify his past actions with post hoc rationalizations. And it blinks reality to assume that a trial judge can also describe with any degree of certainty the process by which any additional information would have factored into his mental calculus had it been presented at the time of sentencing. Our society demands much of trial judges in this day and time; it cannot, however, fairly demand that they be omniscient.

Washington v. Strickland, supra, at 905.

Accordingly, since the testimony of the trial judge does not fall within any of the exceptions enumerated in Mil.R.Evid. 606(b) we find it inadmissible for the purpose of impeaching his sentence. Thus, this assignment of error is without merit.

III

The accused next asserts that the military judge erred by participating in an unrecorded sentencing meeting* and discussing the particular case rather than just his general sentencing philosophy, and thereby induced the accused to plead guilty and led defense counsel to believe that he would not impose a sentence in excess of 30 to 35 years. We disagree.

After reviewing the events and discussions which occurred at the 10 February meeting, as recounted by the parties at the hearing ordered by this Court, we agree with the hearing officer and find that the military judge made no promises, agreements or commitments regarding the

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* The area of pretrial conferences is now covered by R.C.M. 802. All trial participants are encouraged to adhere to its provisions, including the Discussion, especially with regard to when matters discussed in conference must be placed on the record.

sentence he would impose. We find that as of the morning of 10 February, the defense had come to an oral agreement with the convening authority regarding the accused's plea, although the agreement had not yet been reduced to writing or communicated to the accused. The only unresolved issue at the time of the meeting was whether the sentencing case would be presented to the military judge alone or to the panel of members. Defense counsel requested the meeting in order to acquire an impression of the military judge's sentencing proclivities. It appears from the varying recollections of those present that each participant heard only what he wanted to hear. However, we note no words or actions on the part of the military judge that would lead a reasonable person to believe that the military judge had made any promises regarding the sentence.

We further find that the military judge made no attempts to persuade, influence or induce any of the tactical decisions made by the defense. On the contrary, the defense team aggressively pursued every avenue available to them to minimize all risks at trial. They initiated the pretrial agreement with the convening authority as well as the very meeting with which we are now concerned. It is apparent that they were endeavoring to obtain as much insight as possible to make their tactical decisions. We find that the pleas of guilty and the decision to proceed before the military judge alone were not induced by any actions on the part of the government or military judge. Accordingly, based on all the evidence of record, we find this assignment of error also to be without merit.

The accused next contends that the military judge erred by failing to establish the providency of the guilty plea to unpremeditated murder when he was put on notice of matters possibly inconsistent with the plea. He refers to the response of the accused during the providency inquiry wherein he stated that he was hit in the head with a toaster

prior to strangling the accused. The defense contends that this response was inconsistent with a plea of guilty to unpremeditated murder since it raised the possibility that the offense was committed in the heat of sudden passion caused by adequate provocation. Again, we disagree.

As noted in the government's brief concerning this issue, the argument overlooks our opinion in *United States v. Baysinger*, 11 M.J. 896 (A.F.C.M.R. 1981), wherein we stated:

> It is well established that if an accused, after a plea of guilty, sets up matters inconsistent with that plea, the trial judge must either resolve the inconsistency or reject the guilty plea and enter a plea of not guilty. However, *the mere possibility of inconsistency is not sufficient; there must be some substantial indication of direct conflict between the accused's plea and alleged inconsistent statements.* (emphasis added.)

Adequate provocation is defined as provocation which would excite uncontrollable passion in the mind of a reasonable man. M.C.M. 1969 (Rev.), para. 198*a*. The accused's statement that he continued the fight and killed the deceased after he had been hit in the head with a toaster was not a substantial indication that the accused responded in the heat of sudden passion caused by adequate provocation. We therefore find that the accused's responses during the providency inquiry did not raise the issue of adequate provocation which might reduce the offense to voluntary manslaughter. Accordingly, we find no conflict between the accused's plea and his alleged inconsistent statement. *United States v. Logan*, 22 U.S.C.M.A. 349, 47 C.M.R. 1 (1973).

V

We have considered the remaining assignments of error and resolved them adversely to the accused. *Brady v.*

United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), *United States v. Covington*, 12 M.J. 932 (N.M.C.M.R. 1982). We conclude that, considering all the facts and circumstances of this case, the accused's sentence was clearly appropriate.

Accordingly, the findings of guilty and the sentence are AFFIRMED.

CANELLOS, Senior Judge, and CARPARELLI, Judge, concur.

OFFICIAL

/s/ CHARLES L. WILLE
Charles L. Willie
Captain, USAF
Chief Commissioner

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 23506

UNITED STATES

v.

SECOND LIEUTENANT JAMES H. RICE, JR., 455-78-7767 FV
UNITED STATES AIR FORCE

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4 FEBRUARY 1983

Sentence adjudged 18 February 1982 by GCM convened at Randolph Air Force Base, Texas. Military Judge: Kenneth D. Randall (sitting alone).

Approved sentence: Dismissal, confinement at hard labor for life, and forfeiture of all pay and allowances.

Appellate Counsel for the Accused: Mr. Jay D. Terry, Washington, D.C. 20036, Colonel George R. Stevens and Major Alexander S. Nicholas. Appellate Counsel for the United States: Colonel James P. Porter, Colonel Kenneth R. Rengert, Major Michael J. Hoover and Major George D. Cato.

Before
KASTL, RAICHLE and SNYDER
Appellate Military Judges

ORDER

PER CURIAM:

Lieutenant Rice was convicted by a general court-martial, military judge alone, of murder and aggravated

assault, in violation of Articles 118 and 128, U.C.M.J. His approved sentence is dismissal, total forfeitures, and confinement at hard labor for life.

In an able oral argument and assignment of error, the defense contends that the accused's guilty plea was improvident because induced by a subsequently unfulfilled sentencing agreement with the military judge.

The affidavits submitted generally agree that a meeting occured where the military judge's sentencing philosophy arose and that a life sentence and a term of years were addressed. However, the affidavits so not sufficiently resolve the issue, in our judgment. Accordingly, it is appropriate to direct a limited hearing to develop this matter to the fullest extent possible. *See United States v. DuBay,* 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); *United States v. Fairchild,* 14 M.J. 918 (A.F.C.M.R. 1982). Accordingly, the case is returned to The Judge Advocate General of the Air Force for such action as may be required to assure an impartial hearing. The hearing may be ordered by any convening authority designated by The Judge Advocate General for such purpose, and conducted before any military judge who may be detailed in the convening order. Both the accused and the Government will be represented by counsel. Any relevant documents will be considered and copies attached. The military judge conducting the hearing will be furnished the record of trial, to include allied papers. At the conclusion of the hearing, the military judge will make specific findings of fact including, but not limited to, the following questions:

1. *The 10 February 1982 meeting*: Precisely what occurred at the 10 February meeting? In particular, to what degree do the participants support the affidavit of Mr. Frank S. Wright, individual defense counsel? Of particular import are the allegations that the military judge stated, "One life has been lost and I see no need to lose another;" and that the judge repeated

such statement in addressing a possible sentence limitation of 30-35 years' confinement. Also of particular relevance is what, if anything, led to a defense team perception that the military judge had reached a "clear oral understanding" with the defense. All participants should be encouraged to search their recollections carefully to crystalize an accurate, detailed reconstruction of exactly what was said in the 10 February meeting, including the manner in which the words were spoken.

2. *Timing of significant events*: Precisely what was the status of defense bargaining negotiations with the convening authority *prior* to the 10 February meeting with the military judge? Had a pretrial agreement been negotiated with the convening authority before the 10 February meeting? Was such an agreement signed before that meeting?

3. *Defense objections first raised*: After sentencing in this case, when did defense counsel or the accused first raise the objection that an unfulfilled sentencing agreement with the military judge existed? Was the convening authority or staff judge advocate made aware of such a defense contention at any time earlier than its surfacing in the *Goode* response some three months later? How long after trial did Mr. Wright and Mr. Kevin Clancy continue as individual defense counsel; when did Mr. Gerald Goldstein begin to represent the accused (allied papers suggest 25 March 1982).

4. *Trial Counsel participation*: What input did the prosecution team have to the 10 February meeting with the military judge? After the meeting, did the prosecution believe the maximum imposable sentence had been, in practical working terms, reduced to something less than confinement at hard labor for life? At trial, at the time of the *Care* inquiry and

discussion of pretrial agreement between the accused and the military judge, were the members of the prosecution aware of any sub rosa understandings or "deals" with the accused? (See R. 200.)

This list of questions is not intended to be exhaustive. As the facts unfold, the military judge holding this hearing may call other witnesses who might have relevant data. *See generally United States v. Brown,* 13 M.J. 253 (C.M.A. 1982); *United States v. Kazena,* 11 M.J. 28 (C.M.A. 1981); *United States v. Cifuentes,* 11 M.J. 385 (C.M.A. 1981); *see also United States v. Caruth,* 6 M.J. 184 (C.M.A. 1979); *United States v. Williams,* 13 M.J. 843 (A.C.M.R. 1982).

A verbatim record will be made of the proceedings which, following proper authentication, will be submitted to the Court for further review of the case.

OFFICIAL

/s/ RICHARD F. WHITNEY
Richard F. Whitney
Major, USAF
Chief Commissioner

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